



POLICE DEPARTMENT

November 30, 2022

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In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2021-23818
Sergeant Daniel Hill	:	
Tax Registry No. 928487	:	
DCMB Investigations Unit	:	

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At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Daniel Maurer, Esq.
Department Advocate's Office
One Police Plaza, Room 402
New York, NY 10038

For the Respondent: John D'Alessandro, Esq.
The Quinn Law Firm
399 Knollwood Road, Suite 220
White Plains, NY 10603

To:

HONORABLE KEECHANT L. SEWELL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Sergeant Daniel Hill, while assigned to the Critical Response Command or the Critical Response Command Canine Unit, on or about and between April 1, 2019, and August 31, 2020, wrongfully engaged in a continuing course of making inappropriate remarks to, or in the presence of, another Member of the Service.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on October 11 and October 13, 2022. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Police Officers Hailyn Olivares, Anel Capursi, and Hans Jeannot as witnesses. Respondent called Sergeants Christopher Tabing and Fuhad Hussain and Police Officers Roger Sorto, Jorge Bedoya, Ryan Marrero, and Timothy Lambert. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all the evidence in this matter, the Tribunal finds Respondent Not Guilty.

BACKGROUND

This case arises from an EEO claim by Police Officer Hailyn Olivares that Respondent made a series of inappropriate and offensive comments to him while they were both assigned to the Critical Response Command's K-9 Unit (CRC K-9) and after Olivares's dog, K-9 Nick, suffered a career-ending injury in July 2019. The EEO Complaint sheet outlines the following allegations Olivares levied against Respondent in September 2020:

1. December 2019: Respondent told Olivares, "Nobody can fucking understand you anyway," about his accent after specifically calling him over during a roll call in front of other officers and asking him to pronounce a word.

2. April 2020¹: Respondent called Olivares an illegal immigrant.
3. August 27, 2020: Respondent commented Olivares and Officer Capursi were speaking “that stupid Spanish language.”
4. August 28, 2020: Respondent told Olivares that the new CO “likes guys like you.”

(Resp. Ex. D)

The handwritten narrative on the complaint sheet that Olivares completed also alleges that in August 2019, Respondent mimicked throwing a “make-believe” dog off a leash and under a car and ridiculed him in front of others for having a three-legged dog and the fact that his dog was almost killed (Resp. Ex. E).

Olivares filed a Notice of Claim in December 2020, followed by a civil lawsuit, dated June 13, 2021, in New York State Supreme Court, New York County, alleging race discrimination, a hostile work environment, and retaliation. The lawsuit named Respondent, multiple individual executives from CRC K-9, as individual defendants, and the City of New York, for the claims mentioned above in addition to negligent failure to train, supervise, and discipline Respondent (Resp. Ex. A). This complaint alleges that the “illegal immigrant” comment was made on April 20, 2019, rather than April 2020 (*Id.* at p. 7, ¶39).

Respondent denied making any of these comments. On October 4, 2022, this Tribunal denied a pretrial motion to dismiss based on the vagueness of the specification, allowing the Department to create a more fulsome record of the alleged misconduct at trial. Within that context, the Tribunal turns to the evidence presented at trial.

¹ Sergeant Hussain's testimony indicates that at some other point, Olivares asserted that this comment occurred in April 2019. Based on this assertion, EEO questioned Police Officer Capursi about the statement in April 2019. EEO substantiated the allegation as having occurred in April 2019; Respondent later presented roll calls placing Olivares in Miami in April 2019 (T. 225, 230, 236-39).

DISCUSSION

Department's Case

Police Officer Olivares

Police Officer Olivares testified that he was assigned to CRC K-9 as a K-9 handler in March 2019, where he remained until his transfer in December 2020. He always worked day tours, from 0500 x 1325 hours. Respondent, the Third Platoon supervisor, was not his direct supervisor. Still, they would sometimes interact during the overlap between tours, as Respondent often came in early and on some Saturdays (T. 84, 89-91). Olivares agreed that he and Respondent sometimes exchanged friendly text messages about picking up food or coffee for one another; on one occasion, Respondent offered him a ride to work when he did not have his car keys (T. 114; Resp. Exs. F, G).

Olivares testified that in July 2019, shortly after he completed his three-month K-9 training in Miami, his dog, K-9 Nick, was injured and became immobilized after pulling a muscle when going for a run. Olivares explained further that while he was at home on a telephone call with K-9 Nick's veterinarian, and the dog was in his yard, K-9 Nick jumped over a fence², ran into the street and was struck by a car.

Olivares testified that when he reported for duty during the July 4 weekend, he was embarrassed and upset about what had happened with his "dream" opportunity in the K-9 Unit. At this time, he claimed to have encountered Respondent, who asked him, "What's up, Ollie; where's your dog?" while making a "make-believe leash" gesture. Olivares contended that as he walked toward an RMP, Respondent said, "I'm sorry you don't have a dog. You have a three-leg

² On cross-examination, Olivares was confronted with the factual assertion he made in his civil lawsuit that K-9 Nick jumped over a six-foot fence; he testified that the fence in the rear of his home was six and one-half feet high but conceded that the fence the dog jumped over was in the front of the house and was only four feet high (T. 126-127).

dog.” Olivares retorted that at least he had passed the physical and got a three-leg dog. Olivares testified that Respondent’s comment “ma[de] the most impact for me, and that’s why we’re here.” He offered, however, that on another occasion, Respondent told him, “I know what you’re going through. I hope you get your dog” (T. 104-06, 120-27).

Olivares claimed that at the time of the dog’s injury, an unnamed chief told him that he would not be penalized for what had happened. In December 2020 or January 2021, however, the new Commanding Officer of CRC K-9, who had replaced the previous Commanding Officer in August 2020, issued Olivares a Command Discipline for failure to secure Department property (*i.e.*, K-9 Nick). On cross-examination, Olivares denied that he signed the Command Discipline but on re-direct, he conceded that he did sign it but that he did so because he had no other choice (T. 148, 152-55).

Olivares’s testimony then turned to the comments in the EEO complaint he alleged Respondent made. Olivares, who is a native Spanish speaker, testified that he has “a very strong accent” and alleged that Respondent “one time, and one time only” told him something to the effect of “nobody can understand [your] stupid accent.”³ He detailed that he was coming out of the washroom, and Respondent was getting ready to conduct roll call. Some officers were struggling to pronounce a “long word” in English. Respondent, he claimed, engaged him, “Hey Ollie, fall in. Can you say this word?” Olivares asked, “What’s the word?” He recalled everyone laughing, and Respondent said, “It doesn’t matter because nobody can understand you.” He recounted feeling a little aggravated and embarrassed, offering that he was “not saying it was racism” but that he thought it was done to “make fun” of him. In Spanish, he told Respondent, “I have more respect for the rank than you as a person, and I don’t think this is proper behavior for a

³ The EEO and Verified Complaints allege this happened in December 2019. At trial, Olivares stated this happened in December 2020 (T. 163-65).

sergeant, but I could challenge you to go for a run, and I hope you understand that.” He called Respondent “polomo,” which he testified means “punk” in Spanish (T. 90-92).

Olivares next recounted that on a Saturday in August 2020, he was printing training applications in the supervisor’s office when Respondent asked, “What’s up?” and then told him, “Me and Michelle [an admin officer and Respondent’s sometime driver] understand what you and Anel talk that stupid Spanish language.” Olivares said he did not know what spurred this comment other than that “he was bothered by Anel and me talking in the back room in Spanish.” He added, “We were not talking about anybody” (T. 93-95).

Olivares next alleged that during a discussion in the CRC trailer with Officer Bedoya about the taxing physical agility test for K-9 handlers, he was recounting how he ran the 1.5-mile segment in an impressive time and “flew over the wall,” meaning that he did not struggle with the test at all. Respondent, he alleged, was standing “very close” to him near the wash bin and interjected, “If I were an illegal immigrant, I would have no problem going over that wall or running.” He remembered Police Officer Jeannot pulling him aside and asking him, “Are you going to take that? It’s a racist statement.” Olivares told him, “He’s an asshole. I’m taking notes. I’m just watching him” (T. 96-100). On cross-examination, he acknowledged that the verified complaint for his civil lawsuit states that this happened on April 20, 2019, when he was training in Miami with his K-9, but insisted, “I didn’t write that. I did not write the complaint” (T. 127-28)

Around the same period as the comment he alleged Respondent made about him speaking Spanish, Olivares spoke to Respondent in the supervisor’s office about their incoming Commanding Officer. Respondent, he claimed, told him, “I put [the CO] in check . . . in the

locker room. He came in and touched me on my chest, but I put him in his place. You might have a problem because he likes pretty boys like you” (T. 101-02).

Finally, Olivares alleged that in August 2020, he saw Respondent in the washroom with a big smile on his face and asked, “What’s up? Why are you smiling?” According to Olivares, Respondent, in the presence of Police Officers Bedoya and Capursi, replied, “Because I see your stupid fucking face.”⁴ Olivares joked that he needed a hug and “left it like that” (T. 103).

Olivares explained that he initially did not report these comments to the Internal Affairs Bureau, Counterterrorism Investigations, or the CRC Integrity Control Officer because he was in “hot water” due to his dog’s injury and was hoping to get that dog back or get another dog assigned to him. He felt that if he made an allegation against Respondent, “there was no other chance for me to get a dog.” Thus, he hoped to go “unnoticed” and tried to be particularly helpful to the supervisors (T. 106-09).

Olivares confirmed that in August or September 2020, a meeting was scheduled between Respondent and several members of the CRC K-9 executive team where it would be decided whether he remained in the Unit and got a new dog. He testified that he went to Lieutenant Picarelli and asked her to get Respondent to stop making disparaging comments about him and to stop asking him for paperwork related to an out-of-state visit, on job time, to a dog kennel. Olivares maintained he did not have this paperwork, which he claimed the retired CO, Lieutenant Corrigan, had in his possession but Respondent insisted that Olivares turn it over to him. He

⁴ This comment is not explicitly referenced to in either the EEO complaint or the lawsuit. Neither party questioned Police Officer Capursi at trial about this statement. Police Officer Bedoya, however, testifying for Respondent, denied hearing that alleged comment, conflicting with Olivares’s testimony at trial that Bedoya was present when the statement was made (T. 185).

testified that he asked Lieutenant Picarelli not to report Respondent's comments⁵, but she did, which triggered the EEO investigation, culminating in this case.⁶

Olivares testified that it was not his intention to get Respondent fired or to get him in trouble – “all I wanted . . . was for him to understand that I was already in a screwed up position.” He acknowledged that he filed a civil lawsuit naming Respondent, and multiple individual executives from CRC K-9, as defendants. He testified that the lawsuit was not just about Respondent but “the way the [dog] situation was handled and that backfired on me . . . If everything would [have] stayed in-house, I [wouldn't have] file[d] no lawsuit” (T. 106-12, 117-22, 161). When asked what he meant by the complaint backfiring, he offered, “I got kicked out of K-9. I did not get a dog. I lost overtime” (T. 149-50, 156-58).

On cross-examination, Olivares was asked about his claims that Respondent gave white officers in the command favorable treatment. He detailed, “[t]he way he approaches them, hangs out with them, they go out for dinners. He goes out of his way to speak to them, and when I would comment, he would brush me off or be upset or make racist comments; that's favoritism” (T. 141). He also was asked about his claims that white officers got more overtime when publicly available records showed that his overtime pay was more than several white officers in 2020 and 2021 (Resp. Ex. B). He first suggested that maybe one of them had been out sick and another had a dog restricted for biting; he eventually conceded that his overtime was greater than

⁵ Olivares's verified complaint in his civil matter states, “On September 7, 2020, [Olivares] filed a complainant of race discrimination against Hill. [He] was interviewed following his complaint by...OEEO” (Resp. Ex. A at p.9, ¶¶ 62-63). Sergeant Hussain denied that Olivares ever told him during his interview that he asked Lieutenant Picarelli to keep the matter “in-house” (T. 228-229).

⁶ The EEO investigator, Sergeant Hussain, confirmed that Lieutenant Picarelli made the original report. He asked Picarelli whether she had directly heard the specific comments or had ever heard Respondent use racial rhetoric; she indicated that she had not. Sergeant Hussain also testified that he spoke to the retired Commanding Officer, Lieutenant Corrigan, who told him he had never heard Respondent make inappropriate comments (T. 219-24).

four other police officers assigned to the CRC K-9 Unit, each of whom had the same base salary as Olivares (T. 142-48, 151).

Police Officer Capursi

Police Officer Anel Capursi, who came to know Olivares when he joined the K-9 handler unit in 2019, testified that Respondent never directly supervised her. However, like Olivares, there was some overlap between tours or if Respondent performed overtime. She described Respondent as “unprofessional,” frequently gossiping and joking with certain officers about other officers who were not present (T. 13-16, 20).

She testified that Respondent would make Olivares repeat himself and tell him to speak English twice a week during the overlap of tours. She also recalled a specific incident in the dog washroom where Respondent, who was approximately five feet away from her, stated, “if [I] was an immigrant, [I would] be able to fly over the wall too,” about the physical agility test. She also remembered Respondent saying something about Olivares having a three-legged dog in the same conversation (T. 21-25).

Capursi further detailed another occasion where she was in the lounge area of the trailer while Olivares and Respondent were in the dog washroom. Respondent recapped an interaction where he had to “set [the new CO] straight” and told Olivares to be careful because [the CO] “likes boys like you” (T. 26).

Capursi testified that when EEO interviewed her, they asked her about four specific comments alleged to have been made by Respondent to Olivares; she stated that she was surprised because “I heard way more.” She offered that despite hearing these comments that she considered misconduct, she never reported Respondent because it was not her “place” and Olivares was a “grown man.” Respondent had made no comments directly to her. She

acknowledged that she would frequently check in with Olivares after hearing Respondent's remarks to "make sure he was okay" because she knew he was stressed out. Still, their social relationship did not extend beyond that and being connected on social media (T. 14-15, 28-34).

At her October 15, 2020 EEO interview, Capursi indicated that she remembered the comments occurring on the dates Olivares alleged Respondent made the statements. She acknowledged that she confirmed to EEO investigators that the "flying over the wall comment" was made in April 2019, when other evidence demonstrated that Olivares was in Miami for K-9 training. She suggested that she "messed up the years" and that the event might have occurred in April 2020, despite the height of the COVID pandemic when access to the trailer was limited. She offered, "Some people were still in the trailer during this time," sometimes as many as five at a time.

She offered a similar explanation for a comment Olivares alleged had been made in August 2020, which she told the EEO investigator she had witnessed. She also confirmed the December 2019 roll call incident to EEO despite acknowledging that she had no reason to be at Respondent's roll call and testifying on direct examination that she typically rushed off at the end of her tour to pick up her children.

In sum, Capursi testified that she accepted the dates that EEO offered even though she did not have specific recollections of the dates the comments occurred. She explained, "I'm not going to say I recall the date[s], but I do remember the comments." She testified at trial that there was no uncertainty in her mind as to whether Respondent made the specific comments, and she specified that all comments occurred after Olivares finished his training and got his dog (T. 36-48, 50-51, 54-55).

Police Officer Jeannot

Police Officer Hans Jeannot testified that he also heard Respondent's comment about the "wall," referring to the physical agility test. Jeannot, who had worked in CRC K-9 since 2015, was not directly supervised by Respondent and testified that he had no social relationships with anyone on the job. He testified that he had heard Respondent interact with subordinates on many occasions during tour overlap: "sometimes [the conversations] were out of place," meaning unprofessional joking, and sometimes they were "just normal." Concerning the wall comment, Jeannot was "walking by" in the trailer in April 2020 when he heard Olivares state, "At least I passed the physical." Respondent replied, "If I were Hispanic, then I would be able to jump the wall too" (T. 58-65). He stated that this conversation occurred in the presence of at least four officers in the trailer and agreed this was during the height of the pandemic. When asked if protocols were being followed at that time, Jeannot offered, "not that day" (T. 77-78).

Jeannot testified that this was the only comment by Respondent that he perceived as unprofessional toward Olivares. However, he subsequently recounted hearing Respondent say on one occasion that no one could understand Olivares; he did not recall whether Olivares was present when the comment was made⁷ (T. 65-68). He remembered advising Olivares not to let Respondent and others joke around like this "because if you allow it, they're going to think it [i]s okay." Olivares did not respond to his advice at that time (T. 75).

Respondent's Case*Respondent*

Respondent denied making all of the comments alleged and further denied having any strained relationship with or ill will toward Olivares. He described his communication style with

⁷ When EEO interviewed him, Jeannot told the investigator that the comment was made twice, once in Olivares's presence and once "behind his back" (T. 71).

all subordinates as approachable and friendly but professional. He conceded that he may have joked around but never in a way that was “over the line” or offensive. He first got to know Olivares when Olivares did a “tryout” for CRC K-9 in early 2019; Olivares was one of the officers he ultimately recommended to be sent to K-9 training in Miami in spring 2019 (T. 254-55, 283, 290, 324).

In July that year, Respondent returned from vacation and learned there had been an accident with Olivares’s dog. Even after that, they maintained a “friendly and professional relationship.” Respondent testified that he appreciated the facilities and maintenance work Olivares performed while his dog was restricted (T. 256-57).

His only conversation with Olivares about the incident was to see if he was okay. Though the video of the dog being hit by the car was disturbing to him and his belief that Olivares could have avoided the incident if the dog had been kenneled, he did not comment on Olivares’s supervision of the K-9, as he knew his direct supervisor and the K-9 executives would handle that. His “two cents” would not have been “relevant, necessary or helpful” at that time (T. 335-39).

Respondent stated that he had no issues with Olivares until August 2020, when he asked for paperwork regarding an out-of-state kennel visit about which the Deputy Inspector was inquiring. This interaction was unlike their “usual friendly banter;” Olivares replied he did not have the papers and wanted to know who was asking. Respondent then had a face-to-face conversation with Olivares to ensure Olivares understood his request. He testified that Olivares was evasive during that exchange – he claimed he did not have the name or location of the kennel, did not know the date of the visit, and had not prepared any Activity Log entries documenting where he had been. Respondent explained that he expected Olivares to maintain a

folder with any information related to his K-9, as that was common practice for K-9 handlers (T. 257-58, 263-66). Even after this exchange, Respondent testified that he advocated for Olivares to remain in the Unit, even though he was specially trained to work in another CRC subunit. He testified, “We fought very hard. We needed him,” and again praised Olivares’s work with facility maintenance and logistics; that was a great help to the sergeants (T. 270-71, 341).

Shortly after this meeting, Respondent became aware that Olivares made what he described as “false allegations against [him].” He testified that to exonerate himself, he essentially “became [his attorney’s] paralegal, gathering roll calls and determining who was present on any specific day. He compiled all information into a spreadsheet with names, dates, and comments. He described this as a labor-intensive effort with double and triple-checking 167 dates listed in the original Bill of Particulars (T. 283-84, Resp. Ex. K).

Concerning the December 2019 roll call where he allegedly mocked Olivares’s accent, Respondent narrowed the December dates where he and Olivares, along with Jeannot and Capursi, were working and where they could have happened by his roll call at the end of their tours. He came up with only December 18 and 19, 2019 (T. 275-76). Respondent readily acknowledged that Olivares has an accent and sometimes had trouble understanding Olivares because he tended to mumble; still, he denied ever making the alleged comments about the accent (T. 306-07).

Concerning the “illegal immigrant” comment in April 2019 or April 2020, Respondent acknowledged that Olivares had “busted his chops” over not passing the physical agility test but vehemently denied making the alleged immigrant comment in response. He also provided crucial contextual detail about the date this comment was alleged to have been uttered.

Respondent first pointed out that it was undisputed that Olivares was in Miami for all of April

2019. He recalled that April 2020 was the “height of COVID,” and roll calls were conducted either outside or via text and email. He asserted “nobody” but supervisors were allowed in the “very small” K-9 trailer, and the command set up an inflatable tent outside so officers could get their keys and wash down their dogs. Respondent was particularly cautious at that time because his wife was in the midst of a high-risk pregnancy, and he was deeply concerned about exposing her or their two-year-old to the virus, to the point where he resided in a hotel provided by the Department. He stated that everyone in the command was aware of and adhered to the protocols at this time; he described himself as perhaps a laissez-faire boss, but with COVID, he was “strict” and not “playing around.” In addition to his concern for his wife, he was conscious of his officers who had pre-existing conditions or elderly parents or small children at home. He noted that the then-CO had asthma and was similarly intolerant of laxity regarding distancing and protocols (T. 277-82, 329). Respondent also stated that Olivares and the two alleged witnesses to the comment, Capursi and Jeannot, were all out for portions of April 2020 for COVID-related reasons (T. 299).

As to the alleged “stupid Spanish language” comment allegedly made in the trailer on August 27, 2020, Respondent testified that he was assigned to the CRC desk, which is in a separate building from the trailer where the comment was alleged to have occurred. He described this desk assignment as extremely busy with many moving parts and interacting with commands and executives throughout the city. Because of the nature of this assignment, he explained that he conducted his roll call at that desk and was never near the trailer on that date. He stated the only time he left the desk was to give a subordinate specific direction about a U.S. Open assignment (T. 284-88).

Finally, regarding the comment about the new CO “liking boys,” allegedly made on August 28, 2020, Respondent noted that Officer Capursi, who claimed to have witnessed this comment, had been assigned to a search warrant that day and signed out at 1305 hours. Respondent’s tour started at 1350 hours, and he would have headed to the trailer at about 1410 hours. He also stated that during this time, he would have still been doing roll calls by text or email; he noted this worked well in K-9, where different handlers often had entirely different assignments. He agreed that even if he had done an in-person roll call, it would have happened outside and not have started until over an hour after Capursi went off duty. He emphasized again that in the summer of 2020, neither he nor the CO would have tolerated someone hanging around the trailer for an hour after their tour had ended (T. 290-94; Resp. Exs. M, N & O).

Respondent also denied making the “stupid fucking face” comment Olivares alleged for the first time at trial (T. 294).

Respondent acknowledged that his one encounter with the disciplinary system occurred two decades ago while he was in the Police Academy, where he ransacked another officer’s apartment as a prank, causing the officer to believe there had been a break-in. Despite the fact that he was suspended for 30 days, Respondent felt lucky to keep his job, and used the “juvenile” and embarrassing incident as motivation to avoid further misconduct (T. 299). He further testified that he had postponed plans to retire and take a job as a firefighter in North Carolina because he wanted his young children to know if they ever read a news article about these allegations, that he had not pled guilty and “walked away for something I didn’t do” (T. 302).

Several uniformed officers testified on Respondent's behalf; Respondent acknowledged that he had previously given some of these officers positive performance evaluations (T. 308-11).

Sergeant Tabing

Sergeant Christopher Tabing was Olivares's direct day tour supervisor. He testified that Olivares was assigned administrative tasks when he arrived in the Unit, and he had no issues with him. He further asserted that he had never observed Respondent treat any officers disrespectfully and remembered Respondent's communication style with subordinates as "very friendly." He recounted that both he and Respondent met with the Unit's executive team about Olivares's continued presence in the unit and testified that they both expressed that he was an asset to the unit "as a utility man," helping with maintenance. Respondent, he recalled, emphasized that he depended on Olivares and "spoke up about him" (T. 168-72).

Police Officer Sorto

Police Officer Roger Sorto testified that Respondent was his supervisor for three years and never heard him speak disparagingly toward anyone or use racial rhetoric during that time. He specifically denied observing Respondent summon Olivares during roll call and ridicule him for his accent after asking him to pronounce a word. He also detailed that in spring 2020, all roll calls were outside and socially distanced. Respondent was particularly mindful and cautious of COVID protocols out of concern for his officers and his pregnant wife at home. He remembered Respondent being strict about allowing non-essential personnel into the small K-9 trailer during COVID (T. 177-80).

Police Officer Bedoya

Police Officer Jorge Bedoya, another one of Respondent's subordinates, echoed that he had never heard Respondent speak disparagingly or use racial rhetoric toward anyone. Olivares had explicitly claimed that Bedoya was present when Respondent commented on "illegal immigrants" being able to pass the physical; Bedoya denied ever hearing such a comment. He

denied hearing the interaction where Olivares asked Respondent what he was smiling about, and Respondent supposedly replied, “Your fucking ugly face.” He noted this comment was alleged to have been made in the K-9 trailer in August 2020 when Respondent was “very strict” and allowed “only a select few” into the trailer as needed. He corroborated that Respondent was deeply concerned about COVID transmission and social distancing (T. 184-90).

Police Officer Marrero

Police Officer Ryan Marrero, who Respondent supervised for two years and described him as a “good friend,” also confirmed that he has never heard Respondent speak disparagingly or use racial rhetoric toward anyone. He echoed Respondent’s strictness over protocols and trailer access during the COVID pandemic. He specifically denied witnessing the alleged roll call incident where Respondent mocked Olivares’s accent and pronunciation (T. 196-99).

Police Officer Lambert

Police Officer Timothy Lambert, whom Respondent also supervised, offered similar testimony and added that there was never any joking with Respondent, who was “always professional” (T. 204-09).

Credibility

I generally credit Respondent’s testimony as measured, logical, and supported by independent evidence in the record. Respondent denied making any of the statements Olivares attributed to him. Respondent is indeed an interested witness in this proceeding. While he bears no burden of proof, in this case, his in-court testimony undercut portions of the Department’s evidence with undisputed facts.

For example, his testimony established that statements Olivares alleged Respondent made on specific dates were unlikely to have occurred at the times specified, if at all, based upon roll

calls, training records, and duty assignments. While this finding alone does not mean such statements and conversations could not have taken place, it raises significant questions about Olivares's veracity since he was in control of the timing of his accusations and the factual assertions he made to investigators.

Respondent's testimony that he had a pregnant spouse at home during the early days of the pandemic is undisputed; the probative value of that fact is significant. I take judicial notice that at the inception of the pandemic in the spring of 2020, the medical profession and the United States government knew little to nothing about: (1) the origin of the virus, (2) the method(s) of transmission of COVID-19; (3) the incubation period of the virus; (4) who in the population may have been susceptible to becoming infected; (5) what were the effective countermeasures to becoming infected; and (6) what the treatment protocol would be for those who became infected. The virus's mortality rate surpassed the capacity of hospitals, medical examiners, and funeral homes. This Department lost uniformed and civilian members at an alarming rate. In sum, Members of Service daily faced the prospect of becoming infected with a virus for which there were no proven therapeutic drugs, no vaccinations, and an uncertain future, provided they survived becoming infected.

Under these conditions, I find Respondent's testimony that he was profoundly concerned about the health of his wife and his unborn child to be credible and based upon a reasonable apprehension of the risks faced by the general population, let alone uniformed police officers who did not have the option of sequestering themselves until the contagion abated. His assertion that he followed pandemic protocols carefully makes sense, given all that was known and unknown about the COVID-19 virus.

Based upon the findings above, I will infer that he was less likely to have Olivares and other police officers congregating inside a trailer where Olivares alleged he made certain offensive statements. This finding is supported by the testimony of several witnesses who corroborated Respondent's testimony that he conducted roll calls either outside the trailer or by email during the pandemic.

Six police officers from Respondent's command testified for him: Sergeants Tabing and Hussain, as well as Police Officers Sorto, Bedoya, Marrero, and Lambert. They were generally supportive of Respondent's position at trial, denied hearing any offensive statements that the Respondent alleged to have made, and expressed the opinion that Respondent was a good supervisor.⁸ I do not draw any inference of bias in favor of Respondent based solely upon his involvement in several witnesses' performance evaluations.

In contrast, Olivares's testimony before this Tribunal was unclear, inconsistent, and often vague. He is, of course, interested in the outcome of this proceeding, as the civil lawsuit he filed seeking relief from Respondent and other Members of Service was still pending as of the trial date. During his testimony before the Tribunal, he offered no plausible explanation for providing erroneous dates for material events that were later proven inaccurate. His assertion that an incorrect date in the legal pleadings was the fault of his civil attorney is dubious, as Respondent was the source of information outlined in the civil lawsuit. He also made untruthful claims of economic injury in the lawsuit regarding overtime that were demonstrated at trial to have been false.

Finally, Olivares's description of events seemed to be self-serving. For example, he claimed during his testimony that he had "a very strong accent." I had the opportunity to observe

⁸ Their testimony was primarily concerned with Respondent's good character, which the Tribunal permitted Respondent to offer in advance, in mitigation of any penalty recommended in case of a guilty finding.

his demeanor at trial as he testified before the Tribunal. Contrary to his characterization, his accent, while discernable, was certainly not an impediment to being understood by me. This claim seems overstated and may have been an attempt to embellish the claim in his civil lawsuit that he was the subject of discrimination based on his status as a native Spanish speaker.

Second, he claimed in his civil lawsuit that K-9 Nick jumped over a six-foot fence before he was injured; when confronted with this information at trial, he conceded that the fence the dog jumped over was actually two feet shorter than what he had claimed in the lawsuit.

Third, Olivares claimed in his lawsuit that Respondent's favoritism toward white police officers deprived him of overtime wages; when confronted at trial with publicly available records, he was forced to admit that he made more in overtime in a two-year period than four other K-9 handlers in the same unit, all of whom are white.

Despite these issues with his reliability, his testimony was revelatory in several respects. He admitted that he knew he was "in hot water" because K-9 Nick was injured while in his care. He tacitly admitted that the filing of his civil lawsuit was a stratagem to keep him from being transferred out of the K-9 Unit when he asserted at trial that the filing of the lawsuit "backfired" on him, as he was ultimately reassigned. Based upon the totality of the record before me, I find Olivares's testimony unreliable.

The witnesses called by the Department to support Olivares's testimony, Police Officers Capursi and Jeannot, corroborated material portions of his allegations against Respondent. Still, their respective testimonies suffered from the same lack of specificity as Olivares's. They each reiterated that the statements in question occurred at times and places that were eventually proven either inaccurate or unlikely, given the circumstances under which Respondent allegedly made the statements. For example, Capursi claimed to have heard Respondent make an

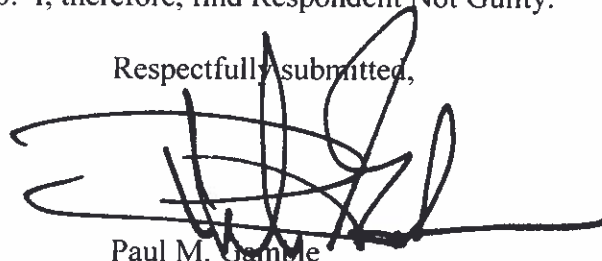
offensive statement at a time when she would have already ended her tour of duty and departed the command. She also claimed that Respondent made an offensive statement to Olivares at a time when Olivares was still training out-of-state in Florida, and could not have been present. Jeannot claimed to have heard Respondent make yet another offensive statement inside the trailer, a location that several witnesses testified was restricted to supervisors during the pandemic.

I do not find that they intentionally sought to mislead the Tribunal, only that their recollections of the material events, in this case, did not have the corroborative effect likely intended by the Department Advocate.

Specification 1: Continuing Course of Inappropriate Remarks

Based upon the preceding analysis, I find that the Department has failed to meet his burden of proof by a preponderance of the credible, relevant evidence that Respondent engaged in a continuing course of making inappropriate remarks to Police Officer Hailyn Olivares between April 1, 2019, and August 31, 2020. I, therefore, find Respondent Not Guilty.

Respectfully submitted,



Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

DEC 22 2022

KEECHAN SEWELL
POLICE COMMISSIONER